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Supreme Court of the United States

October Term, 1974
No. 74-492

STATE OF OHIO,

Petitioner,

vs.

TERRY L. GALLAGHER,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

Interest of Amicus Curiae

The State of California, as the most populous of the fifty states, has had substantial experience under this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), and in attempting to conform its parole revocation procedures to the requirements of this Court's later decisions in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *Amicus curiae* believes that application of the Fifth Amendment prophylactic rules laid down by the Court in *Miranda* would be inconsistent with the parole agent-parolee relationship and in conflict with the due process approach adopted by this Court in *Morrissey* and *Gagnon, supra.*

In addition, the State of California desires to indicate to this Court its belief that the holding in *People v. Gastelum*, 237 Cal. App. 2d 205, 46 Cal. Rptr. 743 (1965), relied upon by the Supreme Court of Ohio herein, is erroneous in its conclusion that a parole agent is required to give *Miranda* warnings to his parolee before questioning him concerning his arrest on new charges.

Summary of Argument

This Court should not extend its application of Fifth Amendment prophylactic rules laid down in *Miranda v. Arizona*, 384 U.S. 436 (1966) to questioning by a parole officer of his parolee arrested by police on new criminal charges. Such questioning is investigatory in nature and at most an aspect of the parole revocation process governed by the voluntariness standard of the due process clause, in accordance with this Court's recent decisions in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The revocation process is an administrative proceeding and not an adversary criminal trial, hence the flexible standard of the due process clause and not the rigid prophylactic rules of *Miranda* are applicable. The recent decisions of this Court in *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 43 U.S.L.W. 4417, and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), have declined to expand the scope of *Miranda*, and have applied instead a due process voluntariness standard.

The function performed by the parole officer is not akin to that of the police interrogator. The parole officer acts more like a social worker than a policeman, and his goal is rehabilitation of the parolee and not the securing of confessions to crime. Questioning by a

parole officer is not inherently coercive and there is no need for the unique prophylactic rules developed in *Miranda* to be applied in this context. The parolee is familiar with his parole officer, with the parole process and with the criminal justice system generally, and the evils of incommunicado police interrogation which this Court dealt with in *Miranda* are not likely to be present. The voluntariness standard of the due process clause of the Fourteenth Amendment provides adequate protection to the parolee, who has a reduced expectation of constitutional protection by virtue of his status as a parolee.

In any event, the interest of society in promptly and accurately determining whether a parolee should remain on conditional liberty in society or should be returned to prison overrides any need for advisement of rights which the parolee might have.

The California case relied upon in part by the Ohio Supreme Court is not persuasive in its reasoning and, in any event, is pre-*Morrissey* and *Gagnon* and does not consider the controlling impact of those cases.

Finally, if the Court should conclude that a *Miranda* warning is required for such questioning, a single advisement should suffice. Since respondent was previously advised by the police and was aware of his rights at the time he talked to his parole officer, his statements should be admissible at trial.

ARGUMENT

I

Questioning by a Parole Agent of His Parolee Arrested by Police on New Criminal Charges Is Investigatory in Nature and at Most an Aspect of the Parole Revocation Process Governed by the Voluntariness Standard of the Due Process Clause Under Morrissey v. Brewer, and Gagnon v. Scarpelli, and Not by the Fifth Amendment Prophylactic Rules of Miranda v. Arizona

A. Application of the Miranda Rules Would Be Inconsistent With the Due Process Standard Used by This Court in Morrissey and Gagnon

All the confession cases decided by this Court in the more than 25 years preceding *Escobedo v. Illinois,* 378 U.S. 478 (1964), were decided under the voluntariness standard of the due process clause of the Fourteenth Amendment. *Miranda v. Arizona, supra,* 384 U.S. 436, 507-08 (1966) (Harlan, J., dissenting). In *Escobedo* the Court for the first time applied the Sixth Amendment right to counsel to invalidate a confession, and in *Miranda* the Court broke new ground again for the second time in two years by turning to the Fifth Amendment privilege against self-incrimination to prohibit incommunicado custodial interrogation by the police without prior warning of rights.

The Fifth Amendment speaks of compelling a person "in any criminal case to be a witness against himself." The words "witness" and "in any criminal case" indicate a privilege applicable at the trial itself or at some analogous proceeding. As Justice Harlan noted in his dissent:

> "Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person 'in any criminal case to be a witness against himself.' . . ."
>
> *Miranda v. Arizona, supra,* at 511.

The majority in *Miranda,* however, viewed pretrial custodial interrogation by the police as an extension of the "criminal case," and applied the Fifth Amendment privilege against self-incrimination to this aspect of the "criminal case." *Miranda v. Arizona, supra* at 460-63. *See Michigan v. Payne,* 412 U.S. 47, 53 (1973) (the prophylactic *Miranda* rules were designed to preserve the integrity of "a phase of the criminal process").

Amicus curiae urges that the function performed by a parole agent when his parolee is arrested by the police on new charges cannot be viewed as an extension of the "criminal case" under the Fifth Amendment, as was done in *Miranda,* but rather should be viewed as an extension of the parole revocation process governed by Fourteenth Amendment due process standards and dealt with recently by this Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973).

In *Morrissey* and *Gagnon, supra,* this Court declined to apply the full panoply of Fifth and Sixth Amendments rights accorded in "criminal proceedings," and instead applied a more flexible Fourteenth Amendment due process standard. As the Court stated in *Morrissey:*

> "We begin with the proposition that the revocation of parole *is not part of a criminal prosecution* and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. Mempa v. Rhay, 389 U.S. 128 (1967). *Parole arises after the end of the*

criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an *administrative agency,* which is sometimes an arm of the court and sometimes of the executive. . . ." 408 U.S. at 480 (emphasis added).

In *Gagnon, supra,* this Court specifically declined to apply a Sixth Amendment right to counsel to the probation revocation process, applying instead a more flexible due process right to counsel standard. This Court equated parole revocation with probation revocation and then reemphasized the basic premise of its holding in *Morrissey:*

". . . Probation revocation, like parole revocation, is not a stage of a criminal prosecution. . . ." *Gagnon v. Scarpelli, supra* at 782.

This Court in *Gagnon* adopted a case-by-case approach under the due process clause by which to judge claimed violations of the right to counsel, stating:

"In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in Betts v. Brady, 316 U.S. 455 (1942), was later rejected in favor of a *per se* rule in Gideon v. Wainwright, 372 U.S. 335 (1963). See also Argersinger v. Hamlin, 407 U.S. 25 (1972). We do not, however, draw from Gideon and Argersinger the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings: *there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." Gagnon v. Scarpelli, supra* at 788-89 (emphasis added).

Just as the pre-*Gideon* case-by-case due process standard was judged adequate to protect the need for counsel at the parole revocation hearing, *amicus curiae* urges that the pre-*Miranda* case-by-case voluntariness appraisal under the due process clause is the proper gauge by which to judge questioning by a parole agent of his parolee arrested on new criminal charges by the police. Indeed, the result in the instant case follows *a fortiori* from this Court's decisions in *Morrissey* and *Gagnon, supra,* since if a due process standard is applicable to the revocation hearing itself—which represents the culmination of the revocation process—it surely follows that a flexible due process standard and not the rigid Fifth Amendment prophylactic rules fashioned in *Miranda* should apply to pre-revocation hearing questioning by a parole agent of his parolee—which is at most a preliminary phase of the revocation process. Just as *Miranda* viewed pretrial police interrogation as an extension of the "criminal case" under the Fifth Amendment, so under *Morrissey* and *Gagnon* pre-revocation hearing questioning by a parole agent constitutes an extension of the revocation process, which is governed by the due process voluntariness standard of the Fourteenth Amendment.

Miranda repeatedly emphasized that the criminal trial is an adversary proceeding, and custodial police interrogation was viewed by the Court as being an extension of the "criminal case" and itself highly adversary in nature, with the goal of the police being to secure a confession of guilt. Thus, the Court spoke of the privilege against self-incrimination as "the essential mainstay of our adversary system" (384 U.S. at 460); referred to "silence in the face of accusation" (384 U.S. at 468); and left no doubt on the issue when

it concluded that the entire purpose of the *Miranda* warnings was "to make the individual acutely aware that he is faced with a phase of the adversary system —that he is not in the presence of persons acting solely in his interest" (384 U.S. at 469).

In contrast, this Court in *Morrissey* and *Gagnon* declined to characterize the revocation process as adversary in nature, and found it to be administrative in nature and hence not requiring "the full panoply of rights due a defendant" in a criminal prosecution under the Fifth and Sixth Amendments. *Morrissey v. Brewer, supra,* 408 U.S. 471, 480. This Court declined to choose between "a full-scale adversary proceeding or no hearing at all," as the Court of Appeals had done. *Morrissey v. Brewer, supra* at 475. Parole officers were characterized not as being part of the criminal prosecution, but rather as being "part of the administrative system designed to assist parolees and to offer them guidance." 408 U.S. at 478. It was noted in *Morrissey* that supervision was "by an administrative agency." 408 U.S. at 480. As if to underscore its reluctance to view the revocation process as being analogous to a criminal prosecution, this Court stated that not even the second stage of the hearings, *i.e.*, the final revocation hearing, was equivalent to a criminal prosecution:

> ". . . We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. . . ." *Id.* at 489.

This Court found the "few basic" due process requirements of *Morrissey* sufficient to insure that "abuses sometimes present in the traditional adversary trial situation do not occur." 408 U.S. at 490.

In *Gagnon v. Scarpelli, supra,* 411 U.S. 778 (1973), this Court reaffirmed what it had held in *Morrissey,* that the revocation of parole "is not a part of the criminal prosecution," and that due process provided the standard of protection for the parolee. 411 U.S. at 781. Again, the Court emphasized, "Probation revocation, like parole revocation, is not a stage of a criminal prosecution." 411 U.S. at 782. In defending its case-by-case approach to counsel problems, this Court in *Gagnon* stated

> ". . . we think it a sufficient answer that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime." 411 U.S. at 789 (footnote omitted).

It is apparent from the several above-quoted statements from *Morrissey* and *Gagnon, supra,* that the parole revocation process cannot be equated to a criminal prosecution and hence cannot be deemed governed by the requirements of the Fifth and Sixth Amendments. Rather, the revocation process is administrative in nature and is governed by the due process standard of the Fourteenth Amendment. Questioning by a parole agent of his parolee arrested by the police on new criminal charges is preliminary to and hence properly viewed as an adjunct of the revocation process dealt with in *Morrissey* and *Gagnon* and governed by the due process clause. As the long line of pre-*Miranda* confession cases makes clear, due process requires only that the statement from the parolee to the parole agent be "voluntary."

B. Recent Decisions of This Court Have Declined to Extend Miranda and Have Applied Due Process Standards in Analogous Contexts

The balance struck in *Miranda* was an extremely close one, as indicated by the fact that *Miranda* was a 5-4 decision over very strong dissenting opinions. The debate over the soundness of the *Miranda* decision has continued in subsequent cases. *See Mathis v. United States,* 391 U.S. 1, 5-8 (1968) (dissenting opinion joined by White, Harlan, Stewart, JJ.); *Orozco v. Texas,* 394 U.S. 324, 327-31 (1969) (concurring opinion of Harlan, J. and dissenting opinion joined in by White and Stewart, JJ.).

The most recent decisions of this Court have shown little inclination to expand the scope of *Miranda* beyond the situation actually dealt with in that case: incommunicado custodial interrogation by the police designed to secure a confession. Thus, in *Harris v. New York,* 401 U.S. 222 (1971), the Court held that statements obtained by the police from a suspect who had not been advised of his *Miranda* rights were nevertheless admissible on rebuttal to impeach the defendant's contrary testimony at trial. The only limitation imposed by this Court was that such statements be "voluntary" and "trustworthy." *Harris v. New York, supra* at 224. It is this same voluntary-trustworthy standard that *amicus curiae* urges be adopted in the instant case. *Harris* was very recently reaffirmed by this Court in *Oregon v. Hass,* 43 U.S.L.W. 4417 (Mar. 19, 1975), where this Court applied *Harris* to a case where the suspect was advised of his rights, invoked them by asking to talk to an attorney and subsequently made statements used by the prosecution at the trial for impeachment. This Court again emphasized the trustworthiness of the statements

there in issue and the importance of ascertaining the truth at trial, as the Court had done in *Harris.* In the instant case, it appears that the statements in issue were admitted by respondent at trial to have been voluntarily made (Petn. for Certiorari, p. 5, citing Tr. pp. 207, 208). It further appears that the parole officer, Mr. Sykes, testified without dispute that he and respondent "just had an informal talk, that no force was used, and that their conversation certainly was not an interrogation." (Petn. for Certiorari, p. 5, citing Tr. p. 167). Under the voluntary-trustworthy standard used by this Court in *Harris* and *Hass,* the statements made here to a parole officer should be admissible at trial.

In *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), this Court again recently applied a due process voluntariness standard by which to test the validity of a suspect's consent to search. Rejecting the application of prophylactic *Miranda* warning rules to such a situation, the Court turned to pre-*Miranda* voluntariness cases as the applicable standard, stating:

> "The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment. Almost 40 years ago, in Brown v. Mississippi, 297 U.S. 278, the Court held that a criminal conviction based upon a confession obtained by brutality and violence was constitutionally invalid under the Due Process Clause of the Fourteenth Amendment. In some 30 different cases decided during the era that intervened between Brown and Escobedo v. Illinois, 378 U.S. 478, the Court was faced with the necessity of determining whether in fact

> the confessions in issue had been 'voluntarily' given. *It is to that body of case law to which we turn* for initial guidance on the meaning of 'voluntariness' in the present context." 412 U.S. at 223-24 (emphasis added; footnotes omitted).

Just as this Court in *Schneckloth* rejected application of *Miranda* in the context of consent to search, and instead turned to pre-*Miranda* cases decided under a due process voluntariness standard, so *amicus curiae* urges here that the Court apply a pre-*Miranda* due process voluntariness standard to the question of admissibility of statements made to a parole officer by a parolee after the parolee has been arrested on new charges.

C. Questioning by a Parole Agent of His Parolee Is Not Inherently Coercive and the Parole Agent Cannot Fairly Be Characterized as a "Law Enforcement Officer" Under Miranda

Miranda reasoned from the premise that custodial interrogation by police is inherently coercive, and hence, absent appropriate warnings to insulate the person being interrogated, any resulting confession must be deemed to be a product of these coercive influences and "compelled" within the meaning of the Fifth Amendment. *See Miranda v. Arizona, supra,* 384 U.S. 436, 457-58, 468. As support for its conclusion, the Court devoted a full 11 pages of its opinion to recounting prior examples of police brutality, torture and improper psychological coercion. Texts and "manuals" were cited, purportedly describing standard interrogation

techniques designed to overcome any reluctance of the suspect to confess. 384 U.S. at 445-56. The majority in *Miranda* then concluded:

> "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. . . ." 384 U.S. at 457.

The majority in *Miranda* viewed the nature of the problem as extraordinary and its cure was correspondingly drastic.

By way of contrast, this Court does not have before it a history of abuses in questioning by parole agents. *Cf. Schneckloth v. Bustamonte, supra,* 412 U.S. 218, 247 (1973) (absent evidence of coercive practices, there is no reason to believe that a request for consent to search is inherently coercive). Indeed, this is not surprising because studies indicate, as this Court suggested in *Morrissey,* that the parole agent views his function as being more akin to a social worker reponsible for the rehabilitation of his parolees than to a policeman seeking to enforce the law and obtain confessions. Thus, in one fairly recent study, the authors concluded that "The parole officer functions in much the same way as a social worker." Note, *Observations on the Administration of Parole,* 79 Yale L.J. 698, 700 (1970). The parole officer attempts to build trust so that he may be "more effective in his guidance function." *Id.* at 700. The parole officer views himself as a "professional" who tries to help the parolee on the road to rehabilitation. *Id.* at 702-03.

In *Miranda,* the Court proceeded on the assumption that the police officer's goal is to secure a confession,

and that any attempt at explanation is viewed as an admission which can be used as a pry bar to secure an utimate, unqualified confession. *See* 384 U.S. at 451-52, 476-77. This assumption does not apply to a parole officer, who is sympathetic to his parolee and much more likely to accept his explanation, or who at least does not view any explanation as a lever to extort further admissions or contradictions. Whereas the Court in *Miranda* viewed the police officer as achieving success when he obtained a confession and failure when he could not, the parole agent views success as successful completion by the parolee of his term of parole and failure as the return of his parolee to prison.

> ". . . Social work theory provides a definition of successful casework: the establishment of a helping relationship. Instead of adopting this definition, however, officers use a more result-oriented approach, in which they concentrate on the ultimate fate of the parolee. *Success is defined as (1) seeing a parolee through to his discharge from parole, or (2) keeping him out of prison longer than he would have stayed out without the officer's supervision. . . .*" Note, *Observations on the Administration of Parole, supra,* 79 Yale L.J. 698, 708-09 (emphasis added: footnote omitted).

The parole agent does not act in a coercive way; he generally views his role as one of providing guidance to the parolee:

> "The parole officer's claim to professionalism is that he does casework, and his professional norms are those of the social worker, not the policeman. Though there are few standard requirements for becoming a parole officer, many have had social work training, and all feel and exhibit a trained sensitivity to the problems of parolees." *Id.* at 703 (footnote omitted).

Again, the Yale study noted:

> ". . . a striking absence of police ideology among parole officers. For example, revocation was recommended only after a series of events which indicated to the officer that the parolee would not benefit from continued parole. This lack of a punitive orientation is particularly remarkable given the attention paid to the conflict between custodial and treatment goals in the sociology of corrections." *Id.* at 705 (footnote omitted).

Obviously, there is some degree of potential conflict between the custodial and rehabilitative functions that the parole agent also performs, but here again the Yale study concludes:

> "The parole officer's authority to invoke sanctions creates conflicts not only with the parolee but also within himself, by forcing him to choose between the goals of rehabilitation and control. Instead of attempting to reconcile these incompatibles, the parole officer unequivocally pursues the former, choosing to be a social worker rather than an adjunct of the police." Note, *Observations on the Administration of Parole, supra,* 79 Yale L.J. at 704.

Applying the *Miranda* rules to questioning by a parole agent would force the parole agent to become an adjunct of the police, driving a wedge between the parole agent and the parolee which would work to the disadvantage of both. The *Miranda* warning would

tell the parolee that the situation is adversary in nature and the parole agent is the adversary, when in fact this is not the truth. At least two courts have recognized that the purpose of parole would be adversely affected and the relationship between the parole agent and the parolee would be seriously strained if the parole agent were required to obtain an affirmative *Miranda* waiver before talking to the parolee. *People v. Ronald W.*, 24 N.Y. 2d 732, 302 N.Y.S. 2d 260, 262 (1969); *Cunningham v. State*, 488 S.W. 2d 117, 120 (Tex. Cr. App. 1973).

None of the above is intended to suggest that a parole agent is incapable of violating the constitutional rights of a parolee during questioning after the parolee's arrest on new charges. It does indicate, however, that the unique coercive pressures which the Court in *Miranda* found to be present in incommunicado police custodial interrogation are not present in the parole agent-parolee situation and that the voluntariness standard of the due process clause provides adequate protection to the parolee for any abuses that may occur.

Even assuming, *arguendo*, that the instant case is governed by Fifth Amendment and not by due process requirements, the decision in *Miranda* was limited to "questioning initiated by law enforcement officers" (384 U.S. at 444), and each of the four cases dealt with in *Miranda* concerned police questioning. *Amicus curiae* urges for the reasons discussed, *supra*, that a parole agent does not perform the function of a "law enforcement officer" as exemplified by the policeman. His function is more closely akin to that of a social worker or counselor, who sees his goal as aiding the parolee in successfully completing his term of parole or at least

in extending the period of time before he is returned to prison.

As this Court noted in *Morrissey v. Brewer, supra*, 408 U.S. at 478:

> "The parole officers are part of the administrative system designed *to assist parolees and to offer them guidance*. . . . And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, *the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.*" (Emphasis added; footnote omitted.)

That the parole agent's goal is not punitive, or to seek a confession of guilt in every case was recognized by this Court in *Morrissey:*

> ". . . In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity. . . ." 408 U.S. at 479 (footnote omitted).

Moreover, unlike the typical situation under *Miranda* where an individual is questioned in a strange environment by a police officer he probably has never seen before under circumstances foreign to his back-

ground, the parolee knows his parole officer and has developed a working relationship with him through many prior contacts on parole. *Cf. Schneckloth v. Bustamonte, supra,* 412 U.S. 218, 247 (1973) ("Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite"). Having been arrested at least once previously on the charge which resulted in his being sent to prison, having been in prison and having knowledge of how the system operates, the parolee is generally in a better position to know his rights and to assert them than the individual subjected to police station questioning under *Miranda.* Parolees are not meek lambs who will confess at the slightest request for information from their parole agents. Although the parole officer strives to build a relationship of trust and communication, the typical parolee nevertheless views his parole agent with considerable mistrust. This mistrust is a natural factor which will further serve to protect the parolee from incriminating himself even without being given *Miranda* warings. *See* Note, *Observations on the Administration of Parole, supra,* 79 Yale L. J. 698, 699, 705-06.[1]

In view of the foregoing, it is not surprising that several states have concluded that a parole officer is

[1]In California, parolees frequently refuse even to sign notification forms developed to comply with *Morrissey* and *Gagnon, supra.* In such cases, the parole agent simply serves the forms on the parolee and notes in his records that the parolee refused to sign them as requested.

not a "law enforcement officer" under *Miranda,* and hence that there is no duty to advise the parolee of his rights. *See People v. Ronald W., supra,* 24 N.Y. 2d 732, 302 N.Y.S. 2d 260, 262 (1969); *Cunningham v. State, supra,* 488 S.W. 2d 117, 120 (Tex. Cr. App. 1973); *State v. Johnson,* 202 N.W. 2d 132, 134 (S. Dak. 1971). As the court stated in *People v. Ronald W., supra* at 262:

> ". . . The clearly stated objectives of education and rehabilitation which are always paramount in the relationship between the probation officer and the probationer . . . are totally foreign to the elements the Supreme Court addressed itself to in Miranda.
>
> ". . . He was questioned not by policemen charged with the duty of apprehending and convicting criminals, but rather by probation officers whose aim is to help probationers rehabilitate themselves.
>
> "It is true that a probation officer is a 'peace officer' . . ., but, certainly, he is not a 'law enforcement' officer within the spirit or meaning of Miranda v. Arizona, supra." (Citations omitted).

The court in *State v. Johnson, supra,* 202 N.W. 2d 132, 134 (S. Dak. 1971) accurately observed:

> "It is the duty of a law enforcement officer to detect crime and enforce the criminal laws of this state. . . . The duty of a probation officer is the antithesis of this. His duty begins when the peace officer's duty ends." (Citation omitted.)

D. The Interest of Society in Determining Whether a Parolee May Safely Remain on Parole Following His Arrest on a New Charge Outweighs Any Need to Advise the Parolee of His Constitutional Rights

In *Miranda*, this Court weighed the interest of society and law enforcement in "a proper system of law enforcement"; stated that it "has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties"; concluded that the decision "should not constitute an undue interference with a proper system of law enforcement"; and noted that the case "does not in any way preclude police from carrying out their traditional investigatory functions." *Miranda v. Arizona, supra,* 384 U.S. at 481.

The interest of society in the immediate determination of the advisability of allowing the parolee to continue on parole, with all available facts being known to the parole officer, is of overriding importance and absolutely critical to the concept of parole. The parole officer charged with the critical responsibility of determining whether an already convicted offender can safely be permitted to remain on parole is in a markedly different position than the police officer interrogating a suspect. The parole officer's function is not accusatorial in nature. Rather it is one of information gathering, a traditional investigatory function of the parole officer. Indeed, although *amicus curiae* urges that a Fifth Amendment standard is completely inapplicable here, and that a Fourteenth Amendment due process standard governs, *Miranda* itself noted that "our decision does not in any way preclude police from carrying out their traditional investigatory functions." *Miranda v. Arizona, supra,* 384 U.S. at 481. In the context of parole, it is not unusual for a parolee to be

arrested on new charges by the police, and a substantial portion of the parole officer's time is expended in the investigatory process of determining the underlying facts, not for the purpose of developing a prosecutable case against the parolee but for the purpose of determining whether the parolee may safely remain on parole. The need to protect society from parolees who have reverted to crime and who pose a danger to society should be deemed paramount over any need a parolee may claim for advisement of rights.

Also to be weighed in the balance is the fact that the parolee does not possess "the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer, supra,* 408 U.S. at 480. The parolee accepts parole on several conditions, including that he cooperate with his parole officer. *Morrissey v. Brewer, supra* at 477. The parolee is often required as part of the parole process to submit to examination of his person as part of a narcotic detection program, to keep the parole officer informed of his residence, employment and similar matters, and to regularly report and discuss his progress with the parole officer. *See Morrissey v. Brewer, supra* at 477-78. Several courts have held that *Miranda* has no application in these contexts and that there is no justification for applying it in the context of questioning by a parole officer after a parolee has been arrested by the police on new charges. *Cunningham v. State, supra,* 488 S.W. 2d 117, 120 (Tex. Cr. App. 1973); *Nettles v. State,* 248 So.2d 259, 260 (Fla. App. 1971); *People v. Hamilton,* 260 Cal. App. 2d 103, 105, 66 Cal. Rptr. 831 (1968).

The very essence of the parole officer-parolee relationship is one of communication between the parole officer and the parolee. The need for communication is greatest when the parolee is in trouble, as for example when he is arrested by police on new charges. Application of *Miranda* to such a situation would seriously impede the parole officer in obtaining the information he must have to make proper evaluations of the parolee's progress toward rehabilitation and to protect society in the event the parolee has in fact engaged in dangerous conduct which warrants his return to prison.

This Court in *Morrissey* recognized the need of parole officers to obtain information:

> "Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a *wholly retrospective factual question:* whether the parolee has *in fact* acted in violation of one or more conditions of his parole. . . ." 408 U.S. 479 (emphasis added).

Application of *Miranda* would result in many cases in the inability of the parole officer to obtain the necessary *facts* from the best source of information, the parolee, so that the parole officer can make this initial determination under *Morrissey*.

The second determination which must be made likewise requires *facts:*

> ". . . This part of the decision, too, *depends on facts,* and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. . . ." *Morrissey v. Brewer, supra,* 408 U.S. at 480.

Unlike the police, who have ample sources of investigation at their disposal, the parole officer is generally on his own and naturally turns to the sources most readily available to him: the parolee and the arresting police agency. But if the parole officer is not to be made an adjunct of the police department, and if he is to act fairly, he must be able to discuss the matter with the parolee himself to learn the parolee's side of the matter and to determine whether mitigating circumstances exist. Both the need to protect society adequately and to be fair to the parolee naturally motivate the parole officer to attempt to discuss the matter with his parolee.

We do not assert that the need for information legitimizes any and all actions by a parole officer. *Amicus curiae* does urge, however, that the voluntariness standard of the due process clause of the Fourteenth Amendment provides sufficient protection to the parolee in this context, consistent with his status as a parolee and the legitimate needs of the parole officer and society.

II

The California Cases Which Apply Miranda Are Pre-Morrissey and Not Persuasive

The Supreme Court of Ohio cited as authority for its holding the California decision in *People v. Gastelum*, 237 Cal. App. 2d 205, 46 Cal. Rptr. 743 (1965). That case held that a confession made in response to questioning by defendant's parole officer and city police officers was inadmissible under *Peopie v. Dorado*, 62 Cal. 2d 338, 353-54, 42 Cal. Rptr. 169, 398 P.2d 361. The *Dorado* case was California's response to and interpretation of *Escobedo*.

Amicus curiae urges that *Gastelum, supra,* is not persuasive for two reasons. First, it reasons that since *Dorado* held *Escobedo* applicable to an incarcerated felon being interrogated by prison guards about an offense committed within the prison walls, "Certainly a parolee in constructive custody is no less entitled to these constitutional rights than is a felony in actual custody." *People v. Gastelum, supra* at 209. *Gastelum* failed to distinguish who was doing the questioning and the function being served in *Dorado*. *Dorado* involved prison guards who were questioning to obtain a confession. A parole agent is not in the same category and serves an entirely different function. Second, *Gastelum* is a pre-*Morrissey* and *Gagnon* case which does not therefore consider the language, rationale and necessary implications from those recent decisions of this Court, which *amicus curiae* urges are controlling in the present case.

Amicus curiae would further note that in *People v. Breen,* 238 Cal. App. 2d 164, 168, 47 Cal. Rptr. 644 (1965), the court merely cited without further discussion its prior decision in *Gastelum, supra,* and held *Dorado* applicable to statements made by a California Youth Authority parolee to his parole officer. The *Breen* case presents no additional analysis or support for its conclusion and is not persuasive for the same reasons that *Gastelum, supra,* is not persuasive.

III

If a Miranda Warning Was Required, the Prior Advisement by the Police Sufficed

The second question presented by the petition for certiorari is whether multiple admonitions are required by *Miranda*. (Petn. for Certiorari, p. 3).

Amicus curiae addresses this question only briefly, because we believe that the due process clause of the Fourteenth Amendment provides the applicable standard by which to judge the instant case, rather than the prophylactic warning rules required by *Miranda* under the Fifth Amendment. Assuming, *arguendo,* that the Court holds *Miranda* to be applicable to the instant case, *amicus curiae* would urge the Court to hold that the prior advisement of rights by the police satisfied the requirements of *Miranda* here, and that the meaningless ritual of *seriatim* multiple admonitions and waivers is not necessary. In California, the courts have held that a single admonition and waiver is generally sufficient to cover subsequent questioning, absent a change in

circumstances or long interval of delay. *People v. Johnson*, 70 Cal. 2d 469, 476, 74 Cal. Rptr. 889, 450 P.2d 265 (1969); *People v. Johnson*, 32 Cal. App. 3d 988, 997, 109 Cal. Rptr. 118 (1973); *In re Steven C.*, 9 Cal. App. 3d 255, 267, 88 Cal. Rptr. 97 (1970); *People v. Long*, 6 Cal. App. 3d 741, 748, 86 Cal. Rptr. 227 (1970); *People v. McFadden*, 4 Cal. App. 3d 672, 687, 84 Cal. Rptr. 675 (1970); *People v. Brockman*, 2 Cal. App. 3d 1002, 1006, 83 Cal. Rptr. 70 (1969); *People v. Sievers*, 255 Cal. App. 2d 34, 37-38, 62 Cal. Rptr. 841 (1967).

While in the instant case there was a delay of four days between the initial interrogation by the police and the initial effort of the parole officer to speak to respondent, and eleven days between the initial interrogation by the police and when the parole officer actually spoke to respondent, there is no indication that respondent did not understand his rights when he spoke to his parole officer. Indeed, the strongest evidence that he did understand the prior *Miranda* warning given to him by the police is the fact that when his parole agent attempted to talk to respondent on June 26, 1972, respondent refused to discuss the matter (Petn. for Certiorari, p. 4, citing Tr. pp. 147-49, 151). It is clear that respondent knew his rights on July 3 and that he voluntarily chose to speak to his parole officer at that time without being forced to do so (Petn. for Certiorari, p. 5, citing Tr. pp. 207, 208).

Conclusion

For the foregoing reasons, *amicus curiae* State of California joins petitioner State of Ohio in urging that the judgment of the Supreme Court of Ohio be reversed.

Respectfully submitted,

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